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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SCOTT E. MILLER, Plaintiff and Appellant, v. OCWEN LOAN SERVICING, LLC et al., Defendants and Respondents.	B287848 (Los Angeles County Super. Ct. No. NC060790)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael P. Vicencia, Judge. Affirmed.

Kinley Law Practice and Matthew L. Kinley for Plaintiff and Appellant.

Houser & Allison, Robert W. Norman, Jr., Emilie K. Edling, and Neil J. Cooper for Defendants and Respondents.

Plaintiff and appellant Scott E. Miller (Miller) appeals from a judgment entered in favor of defendants and respondents Ocwen Loan Servicing, LLC (Ocwen) and Deutsche Bank National Trust Company as Trustee for IndyMac INDX Mortgage Loan Trust 2005-AR9, Mortgage Pass-Through Certificates Series 2005-AR9 (the Trust) following defendants' successful motion for summary judgment.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Factual background*

A. The Loan Modification

In 2005, Miller obtained a $600,000 loan evidenced by a promissory note dated May 10, 2005, and deed of trust recorded against real property located in Long Beach, California. Miller defaulted on the loan in 2013.

In 2015, Miller and defendants entered into a loan modification agreement. Miller executed the modification on June 1, 2015, and e-mailed it to defendants on June 9, 2015. Ocwen signed the modification on June 26, 2015.

The terms of the modification provided that it was "subject to clear title and will be effective on May 1, 2015, on condition that a clear and marketable title policy can be issued." Under the modification, Miller's new payments were to start May 1, 2015, and recur on the first of each month thereafter. In fact, the modification specified that "[t]ime . . . shall be of the essence as to your obligations under this Modification." The modification does not provide that time is of the essence for defendants' performance. In addition, the modification provides: "If [Miller] default under this Modification or the Loan Documents after the Effective Date (your 'Default'), Ocwen may, in addition to the

remedies provided by the Loan Documents, subject only to applicable law, institute any foreclosure or collection proceedings."

B. Miller's Default and Defendants' Performance

Miller failed to make the payment due June 1, 2015, or the next year of payments due.

And, Miller failed to satisfy the modification's condition of clear title and a clear and marketable title policy. Following the parties' agreement to the modification, defendants ordered a title search to ensure that this condition had been met. The July 27, 2015, response from the title company was that title needed to be transferred from a family trust back to Miller, and Miller's wife needed to grant the property back to him as well.

On August 4, 2015, defendants asked Miller to clear title as required under the modification. After nearly four months, on November 30, 2015, defendants received the corrective deeds from Miller. With all the conditions met, the loan was updated to reflect the modification, relating back to the May 1, 2015, effective date set forth in the modification.

On December 24, 2015, based on Miller's failure to make monthly payments on June 1, 2015, and thereafter, Ocwen mailed Miller a notice of default and informed him that the amount to reinstate must be paid by "Money Gram, Bank Check, Money Order, or Certified Funds," consistent with language in the deed of trust. In spite of the payment specification in the notice of default, on or about January 25, 2016, Miller tendered a personal check to Ocwen, which was rejected and returned to Miller. Based upon the postmodification default, a notice of default was recorded on March 31, 2016.

Ocwen accepted payment from Miller on August 4, 2016, which brought the loan current through the August 2016 payment and stopped foreclosure. Thus, on August 16, 2016, a rescission of the March 31, 2016, notice of default was recorded.

However, Miller failed to make payments after his August 4, 2016, payment.

II. *Procedural background*

Miller initiated this litigation on August 31, 2016. His complaint, the operative pleading, alleges: breach of contract, breach of the implied covenant of good faith and fair dealing, slander of title, violation of Business and Professions Code section 17200, and accounting. According to the complaint, defendants breached the modification and the implied covenant of good faith and fair dealing "when: (1) Ocwen failed to sign the loan modification contract that they had drafted and offered to [Miller] and that was executed 'in wet ink' by [Miller] at Ocwen's request; (2) Ocwen failed to honor the loan modification contract that they had drafted and offered to [Miller] even though it was a fully-executed and operative Loan Modification under binding California law, completing ignoring the permanent modification that they had drafted and offered by accelerating [Miller's] loan and demanding a seven-figure lump-sum payment; (3) Ocwen refused to accept [Miller's] tender of the reinstatement amount that they had requested; and (4) Defendants, and each of them, proceeded with the foreclosure process when [Miller] was ready, willing, and able to tender the amount due on his loan." Miller also requested "a full, complete and accurate accounting" of his payments due under the modification.

Defendants moved for summary judgment or, in the alternative, summary adjudication. Regarding the breach of

contract cause of action, defendants argued that (1) Ocwen honored the modification, (2) Ocwen signed the modification, (3) Ocwen did not refuse to accept Miller's tender or otherwise prevent Miller from curing his default, and (4) there were no improper foreclosure proceedings. Because the breach of the implied covenant of good faith and fair dealing cause of action was derivative of the breach of contract claim, it failed for the same reasons.

Miller opposed defendants' motion, arguing that a triable issue of fact existed as to whether Ocwen failed to modify the loan, whether Ocwen failed to provide a signed copy of the modification to Miller, whether Ocwen failed to accept Miller's tender, and whether Ocwen breached the modification by proceeding with foreclosure. Regarding the breach of the implied covenant cause of action, Miller asserted that Ocwen interfered with his performance of the modification.

After entertaining oral argument, the trial court granted defendants' motion, finding that Miller "failed to meet his burden of providing substantial responsive evidence to defeat summary judgment." Regarding the first and second causes of action, Miller failed to present sufficient evidence to create a triable issue of fact.

Judgment was entered, and this timely appeal ensued.

DISCUSSION

I. *Standard of review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

Like the trial court, "[w]e first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, we determine whether the moving party has established facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, we determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citation.]" (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 836.) "[W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

In exercising our de novo review, we consider "'all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence.'" (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.)

II. *Analysis*[1]

A. Breach of contract

The elements of a cause of action for breach of contract are (1) the existence of the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) resulting damage to the plaintiff. (*CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239.)

As the trial court found, Miller did not demonstrate a triable issue of fact to defeat defendants' motion for summary judgment. Specifically, there is no evidence that defendants breached the modification.

In urging reversal, Miller contends that there is a triable issue of fact in support of four alleged breaches of the modification. We reject each in turn. First, Miller argues that Ocwen failed to return an executed copy of the modification, which he then suggests amounted to either a breach or an anticipatory breach of the modification. To the extent this argument is based upon Miller's theory that Ocwen delayed in signing the modification, he has not demonstrated a triable issue of fact. It is undisputed that Ocwen signed the modification on June 26, 2015. Moreover, as Miller acknowledges, there was no requirement that defendants provide him with an executed copy of the modification in order for it to be effective.

Second, Miller asserts that Ocwen breached the modification by demanding new deeds. Miller is mistaken. The

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[1] Although his complaint contains five causes of action, all of which were adjudicated against Miller, Miller only challenges the breach of contract, breach of implied covenant, and accounting causes of action on appeal.

modification expressly provides that it was "subject to clear title and will be effective on May 1, 2015, on condition that a clear and marketable title policy can be issued." The undisputed evidence shows that defendants requested the deeds from Miller approximately one week after the title company indicated that the deeds were necessary in order to clear title. Despite defendants' request, Miller did not provide the recorded deeds for nearly four months.

In an effort to circumvent this contractual language, Miller suggests that it took too long to satisfy this requirement. His one-sentence argument is insufficient; there is no evidence or argument explaining why this requirement was too time-consuming. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].)

Miller also contends that the terms "clear title" and "marketable title policy" are too uncertain to be enforced. We disagree. "Title" means "[l]egal evidence of a person's ownership rights in property; an instrument (such as a deed) that constitutes such evidence." (Black's Law Dict. (10th ed. 2014).) Clear title is a title free of encumbrance. (*Ferguson v. Edgar* (1918) 178 Cal. 17, 19.) "'Marketable title' is that title which a reasonable buyer, well informed as to the facts and their **legal** consequences and willing and anxious to perform the contract, would, in the exercise of the prudence that business persons ordinarily bring to bear on such transactions, be willing to accept [citation]. To be 'marketable,' a title must be sufficiently free from defects to enable the holder to retain the property, to

possess it in peace, and, when the time comes to sell it, to be reasonably sure that no flaw or doubt will arise to disturb its market value [citation]. To qualify as 'marketable,' a title must embrace both the **legal** and equitable estates, be free from unknown encumbrances, and be defensible and salable [citation]." (11 Cal. Legal Forms—Transaction Guide, § 26A.11, subd. (1).) A title policy is a contract of indemnity, whereby an insurer agrees to indemnify the insured to the extent the insured suffers a loss caused by defects in the title or encumbrances on the title. (*Karl v. Commonwealth Land Title Ins. Co.* (1993) 20 Cal.App.4th 972, 978.) Applying these definitions, the challenged terms are not too uncertain to be enforced.

Miller then argues that the deeds were unnecessary because a reasonable person would still have purchased the property from the family trust;[2] therefore, the trust did not need to deed back the property to Miller. Miller confuses the issue. The question is not whether the family trust could sell the property to a third party; rather, the question is whether the lender could enforce the loan modification—an agreement between defendants and Miller—against the property if the property was not in Miller's name.

Third, Miller contends that he properly made a tender of the monies due and that Ocwen wrongfully denied his tender. Again, Miller is wrong because his tender was nonconforming. Ocwen required that the tender be paid by "Money Gram, Bank Check, Money Order, or Certified Funds." Miller's attempt at

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[2] As set forth above, the family trust was the entity that the title company identified as needing to transfer the property to Miller in order for title to be clear.

payment with a personal check did not meet the agreed-upon terms, and Ocwen therefore was entitled to reject it. (*Little v. Pullman* (2013) 219 Cal.App.4th 558, 567.)

Finally, Miller asserts that Ocwen breached the modification by waiting until January 2016 to record the notice of rescission of notice of default. But Miller does not explain how this conduct amounts to a breach of the modification. Significantly, he does not cite to any evidence or offer a reasoned legal argument supported by authority that the notice of rescission had to be recorded within a particular time. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Benach v. County of Los Angeles*, *supra*, 149 Cal.App.4th a p. 852.)

B. Breach of the implied covenant of good faith and fair dealing

The trial court properly granted summary adjudication of the breach of the implied covenant cause of action for the same reasons it granted summary adjudication of the breach of contract cause of action. As explained in *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395, "[i]f the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (Accord, *Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal.App.4th 1358, 1370 [where "claim of breach of the implied covenant relies on the same acts, and seeks the same damages, as its claim for breach of contract," summary adjudication is affirmed on the ground that "the cause of action for breach of the implied covenant is

duplicative of the cause of action for breach of contract, and may be disregarded"].)

As set forth above, the allegations of the breach of implied covenant cause of action mirror those set forth in the breach of contract cause of action. It follows that judgment was properly entered against Miller on this cause of action for the same reasons the trial court granted defendants' motion vis-à-vis the breach of contract cause of action.

C. Accounting

Although Miller seeks a reversal of the summary adjudication of the accounting claim, he does not offer any legal argument in his appellate brief. We therefore deem this challenge forfeited on appeal. (*Benach v. County of Los Angeles*, *supra*, 149 Cal.App.4th at p. 852; *Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 165.)

DISPOSITION

The judgment is affirmed. Defendants are entitled to costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT